14,812-18

RECORD, CASE No. 14,812.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1338.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HARRY S. HUTTON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 19, 1891.

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INDEX.

	Original.	Print.
Declaration	1	1
Affidavit of H. S. Hutton	3	1
Summons	4	2
Defendant's plea	5	2
Demurrer to plea	6	3
Note as to matters of law to be argued	6	3
Order certifying demurrer to general term	7	3
Order for judgment in general term	8	4
Judgment in general term	9	4
Opinion in general term	11	5
Writ of error	21	8
Citation and proof of service	22	9
Certificate to record	23	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1891.

1 *Declaration, &c. Filed Aug't* 21, 1890.

In the Supreme Court of the District of Columbia.

HARRY S. HUTTON
vs.
THE DISTRICT OF COLUMBIA. } No. 30875. At Law.

1. The plaintiff sues the defendant, a municipal corporation created by act of Congress, for money payable by the defendant to the plaintiff for work done and services rendered by the plaintiff to the defendant at the special instance and request and under its appointment, dated June 4, 1890, as a private officer of the Metropolitan police force of said District, from the 6th day of June,
2 1890, to the 20th day of August, 1890, at the rate of seventy-five dollars per month, whereby and by reason whereof the said defendant became indebted to the plaintiff in the sum of $182.50, and the defendant, although requested and demanded to pay the same, has hitherto refused and still refuses so to do, to the damage of the plaintiff in the sum of $182.50, and therefore he brings this suit.

2. And the plaintiff sues the said defendant for money payable by the defendant to the plaintiff for work done and services rendered by the plaintiff for the defendant at its request, and for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims $182.50, with interest on $75.00, part thereof, from July 6, 1890, and on $75.00, part thereof, from August 6, 1890, and $32.50, part thereof, from August 20, 1890, besides the costs of this suit.

ANDREW B. DUVALL,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the first day of the first special term of the court occurring twenty days after service hereof; otherwise judgment.

A. B. DUVALL,
Attorney for Plaintiff.

3 *Affidavit under 73d Rule.*

DISTRICT OF COLUMBIA, *sct:*

Personally appears Harry S. Hutton, who, being duly sworn, deposes and says that he is the plaintiff in the foregoing and annexed declaration; that the District of Columbia is the defendant therein; that on June 4, 1890, affiant was duly appointed by the Commissioners of said District a private officer of the Metropolitan police force of said District, at the pay and salary at the rate of seventy-five dollars per month, and affiant, upon the request of the said Commissioners, well and faithfully rendered and performed his services and duty

as such officer on said police force from the sixth day of June, 1890, until he was by said Commissioners, on August 19th, 1890, relieved from duty as such officer, and by reason of the premises the said District of Columbia became indebted to affiant in the sum of $181.50. Affiant has demanded payment thereof, but defendant has refused to pay the same or any part thereof; that the said sum of $181.50, with interest, as in said declaration claimed, is justly due and owing to plaintiff from the defendant by reason of the premises, exclusive of all set-offs and just grounds of defense.

(Signed) H. S. HUTTON.

Subscribed and sworn to before me this 20th day of August, A. D. 1890.

(Signed) R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

4 *Summons. Issued August* 21, 1890.

In the Supreme Court of the District of Columbia, the 21 day of August, 1890.

HARRY S. HUTTON, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 30875.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court, on the first day of its first special term occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness E. F. Bingham, chief justice.

[SEAL.] R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

5 *Defendant's Plea. Filed Aug.* 23, 1890.

In the Supreme Court of the District of Columbia.

The defendant for plea says it is true, as in the said plaintiff's declaration alleged, that the said plaintiff was by this defendant, acting through its Commissioners, on the 4th day of June, 1890, appointed and commissioned as a private officer on the Metropolitan police force of said District, upon pay or salary at the rate of seventy-five dollars per month, and that thereafter said defendant well and faithfully performed the service required as such police officer

from the 6th day of June, 1890, until the 19th day of August, 1890, when he was relieved from duty as such officer by said Commissioners; but this defendant says that by reason of anything in said declaration contained the said plaintiff ought not to have or maintain his said action against the said defendant, because it says the said plaintiff, at the time of his appointment as such police officer, had not served in the Army or Navy of the United States; which said service was and is a condition precedent to the legal appointment of any person as a member of said police force under the statute in such case made and provided; and this the defendant is ready to verify; wherefore it prays judgment if said plaintiff ought to have or maintain his aforesaid action against it.

GEORGE C. HAZELTON,
S. T. THOMAS,
Attorneys for Defendant.

6 *Demurrer to Plea. Filed Feb'y* 21, 1891.

In the Supreme Court of the District of Columbia.

The plaintiff says that the defendant's plea is bad in substance.

A. B. DUVALL,
Attorney for Plaintiff.

NOTE.—Among the matters of law intended to be argued are:

1. That the statute relied upon by the defendant in said plea has been repealed, and there is no such statute in force in the District of Columbia.

2. That the appointment of plaintiff as private officer on the Metropolitan police force and the acceptance of his services by the defendant, as set forth in said plea, entitle plaintiff to recover against defendant for such services.

GEORGE C. HAZELTON,
S. T. THOMAS,
Attorneys for the District of Columbia.

7 *Court Proceedings.*

Proceedings before the supreme court of the District of Columbia, holding a circuit court and special term in and for said District, commencing the first Tuesday, it being the 6th day, of January, A. D. 1891.

TUESDAY, *January 6th, A. D.* 1891.

By order of Walter S. Cox, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

SATURDAY, *February* 21, *A. D.* 1891.

Session resumed pursuant to adjournment; Cox, justice, presiding.

HARRY S. HUTTON, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 30875.

Upon motion of the defendant, by its attorney, Mr. S. T. Thomas, it is ordered that the demurrer filed in this cause be certified to the general term, to be there heard in first instance.

8 *Proceedings in General Term.*

MONDAY, *April 6th*, 1891.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning the first Monday, April 6, 1891.

Present, presiding: Chief Justice Bingham and Justices James and Montgomery.

By order of the court, — by proclamation of the marshal.

MONDAY, *June* 1, 1891.

Session resumed pursuant to adjournment.

Present: Justices Hagner and James.

HARRY S. HUTTON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 30875.

This cause having been certified from the special term at law to be heard here in the first instance, and being by respective counsel *pro* and *con.* submitted without argument upon the plaintiff's demurrer to defendant's plea to illegality of the plaintiff's appointment, and the same being understood, it is thereupon con-
9 sidered that plaintiff have and recover of defendant as claimed in his declaration, together with his costs, and have execution therefor, and the cause is remanded to the special term with direction thereunto.

SATURDAY, *July* 11, 1891.

Session resumed pursuant to adjournment.

Present: Chief Justice Bingham and Justices Hagner and James.

* * * * * * *

HARRY S. HUTTON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 30875.

The questions of law arising upon the defendant's demurrer to the plaintiff's declaration having been certified by the justice holding the circuit court to be heard by the court in general term in the first instance, and the same having been submitted to and considered by

the court, it is, this 10th day of July, 1891, by the court in general term considered, ordered, and adjudged that the
10 plaintiff's demurrer to the defendant's plea be, and the same is hereby, sustained; and the attorney for the defendant having announced in open court that he has no other or further plea to make or offer, it is further ordered, adjudged, and considered that the plaintiff do have and recover of the defendant the debt in his declaration mentioned, to wit, the sum of one hundred and eighty-two dollars and fifty-two cents, with interest on $75.00, part thereof, from July 16th, 1890, and on $75.00, another part thereof, from the 6th day of August, 1890, and on $32.50, the residue thereof, from August 20th, 1890, until paid, and his costs, to be taxed by the clerk, and that he do have execution thereof.

It is further ordered that the order and judgment entered in this cause on the first day of June, 1891, be, and the same is hereby, set aside and for naught held.

E. F. BINGHAM, *C. J.*

11 *Opinion of Court in General Term. Filed June* 1, 1891.

In the Supreme Court of the District of Columbia, in General Term.

HARRY S. HUTTON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 30875.

James, justice, delivered the opinion of the court:

This is an action for money payable for work done and services rendered by the plaintiff as a private officer of the Metropolitan police force. The plaintiff was appointed and commissioned on the 4th of June, 1890, upon pay or salary at the rate of seventy-five dollars per month, and performed service until the 19th of August, 1890, when he was relieved from duty without receiving compensation. In this action the District has interposed a special plea that the plaintiff ought not to recover, because at the time of his appointment by the Commissioners he had not served in the Army or Navy of the United States, and that such service was and is a condition precedent to legal appointment on the police force.
12 To this plea a demurrer was filed by the plaintiff, and the case has been certified to the general term, to be heard here in the first instance.

The question involved is whether section 354 of the Revised Statutes of the District of Columbia has been repealed by the act of June 11, 1878. (20 St., 102.)

Section 354 was drawn from the act of 6 Aug., 1861 (12 Stat., 321), and the act of 3 March, 1867 (14 St., 457), and provided that "no person shall be appointed to office or hold office in the police force who cannot read and write the English language or who is not a citizen of the United States or who shall ever have been indicted and convicted of crime; and no person shall be appointed as policeman or watchman who has not served in the Army or Navy of the United States and received an honorable discharge."

The first clause of this section was one of the provisions of an act which established a police force and provided for its governmemt. It provided "a board of five commissioners of police" (Rev. St., S. 322); gave to that board authority to make "rules and reg-
13 ulations for the proper government and discipline of its subordinate officers" (Rev. St., S. 337); provided that the officers of the force should be appointed by the board (sec. 341) and for the method of their removal (S. 355). In short, that statute provided a complete scheme for the organization and government of the police force as a separate and independent department of the municipal institutions of the District of Columbia. It is to be observed that the board of commissioners was to be appointed by the President, by and with the advice and consent of the Senate.

In 1878 this scheme of organization and government was abandoned, and Congress, by the act of 11 June, 1878 (20 St., 102, C. 180), merged the police establishment in what was intended to be a complete system of government for this District, concentrating in the hands of the District Commissioners the powers and duties which had been independent of them and giving for them more perfect performance, enlarged and additional powers. Eckloff *vs.* The District, 4 Mack., 372; 135th U. S., 240.

14 The 3d section of the new act authorized the District Commissioners "to abolish any office, * * * remove from office, and make appointments to any office under them authorized by law." The 6th section provided "that from and after the first day of July, 1878, the board of Metropolitan police and the board of school trustees shall be abolished, and all the powers and duties now exercised by them shall be transferred to the Commissioners of the District of Columbia, who shall have authority to employ such officers and agents and to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this act."

The effect of this grant of powers was considered in the case above referred to. We cannot do better than quote at some length the statement of Mr. Justice Brewer, speaking for the court in Eckloff *vs.* The District, 135th U. S., 342, '3. He said: "When to a board having general administrative supervision of the affairs of a community and with plenary power in the matter of appointment and removal of subordinates is added the control of another
15 department and no express words of limitation are found in the act making the transfer, it is to be presumed that such board has the same plenary power in respect to this new department and is not hampered by limitations attached to the board which theretofore had control of it. The presumption against implied repeal obtaining in the construction of ordinary statutes yields to the inferences arising from the subject-matter of legislation. Plenary power having been found by experience valuable in the management of affairs already under the control of the board, the transfer of another department to the same control carries with it a strong implication that the added department is subject to the same plenary powers. The primary thought is not a mere transfer

of authority, but the bringing of the added department within the control of the general supervising board. It is unity of administration and not change of commission.

"But our conclusions are not controlled by this construction alone. The court below placed its decision on what we con-
16 ceive to be the true significance of the act of 1878. As said by that court, it is to be regarded as an organic act intended to dispose of the whole question of a government for this District. It is, as it were, a constitution for the District. It is declared by its title to be an act to provide 'a permanent government for the District.' The word permanent is suggestive. It implies that prior systems had been temporary and provisional. As permanent it is complete in itself. It is the system of government. The powers which are conferred are organic powers. We look to the act itself for their extent and limitations. It is not one act in a series of legislation and to be made fit into the provisions of the prior legislation, but is a simple, complete act, the outcome of previous experiments and the final judgment of Congress as to the system of government, which should obtain. It is the constitution of the District, and the grants of power are to be taken as new and independent grants and expressing in themselves both their extent and their limitations. Such is the view taken by the court below,
17 and such we believe to be the true view to be taken of the statute."

The particular question under consideration in that case was whether the Commissioners were restricted in the matter of removals by the provision which forbade the board of police, to whose powers they succeeded, to remove officers except after a trial. We conceive that the reasoning of the supreme court is equally applicable to the subject of appointments on the force, and demonstrates that in that respect also the District Commissioners were freed from the restrictions and limitations which had affected the system which was done away. Indeed, the grant of power contained in the 6th section of the new or organic act hardly seems to call for the processes of construction. It distinctly provides that the Commissioners "shall have authority to employ such officers * * * as may be necessary to carry into execution the powers and duties devolved upon them by this act." This language is directly applied to the police force, and, as a matter of mere interpretation, it
18 indicates a plenary power as to the selection of the persons to be appointed. It appears in terms to exempt the appointing power from restrictions or limitations in their selection.

We hold, then, that the section referred to in the plea is not now in force, and that the Commissioners of the District had at the time of the plaintiff's appointment full power to appoint on the police force persons who had never served in the Army or Navy of the United States. It follows, of course, that, as the plaintiff's appointment and employment were lawful, he must recover compensation at the rate agreed upon.

We think it is proper to add the considerations which induced Congress to provide this qualification of service in the army or

navy are matters of public history of which this court may take judicial notice, and that in our opinion it was the legislative intention to make an honorable discrimination in favor of the men who had then recently returned to the competitions of civil life
19 after service in the late war. On the other hand, there is no reason to suppose that Congress would thus discriminate in favor of men who enlist in these services in time of peace; and the strict terms of the statute are consistent with an interpretation which limits that discrimination to service rendered before its passage. The language used in 1867 was that "no person shall be appointed as policeman or watchman who has not served in the Army or Navy of the United States and received an honorable discharge." We are aware that this form of expression is often used when the statute intends to include an event or condition recurring from time to time after its enactment, but there is in this respect no rigid rule of interpretation. It will be understood that only a past event or condition is referred to when there is reason to hold that such was the legislative intent. It is not likely, we repeat,
20 that Congress intended to discriminate between the citizen and the soldier or sailor of a peace establishment.

For the court:

CHARLES P. JAMES.

21 *Writ of Error to the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Harry S. Hutton, plaintiff, and The District of Columbia, defendant, being No. 30875, at law, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commaded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from July 20th, 1891, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of July, in the year of our Lord 1891,

and of the Independence of the United States the one hundred and sixteenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

22 *Citation to the Supreme Court of the United States.*

The United States of America to Harry S. Hutton, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The District of Columbia is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety-one.

July 20, 1891.

E. F. BINGHAM,
Chief Justice.

Service acknowledged on this 17th day of August, in the year of our Lord one thousand eight hundred and ninety-one.

A. B. DUVALL,
Att'y for H. S. Hutton.

23 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 15th day of August, 1891.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 15 day of August, 1891.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 15th day of August, 1891.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: Case No. 14,812. District of Columbia supreme court. No. 1338. The District of Columbia, plaintiff in error, *vs.* Harry S. Hutton. Filed August 19, 1891.

Office Supreme Court U. S.
FILED.
JAN 8 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE DISTRICT OF COLUMBIA, PLAINTIFF in error,
v.
HARRY S. HUTTON.
} Term No. 1338.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PLAINTIFF IN ERROR.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE DISTRICT OF COLUMBIA, PLAINTIFF in error,
v.
HARRY S. HUTTON.

Term No. 1338.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PLAINTIFF IN ERROR.

This action, as the declaration discloses, was brought by Hutton, the defendant in error, to recover wages at the rate of $75 a month, with interest, for services as a member of the Metropolitan police force from June 6, 1890, to August 20, 1890 (p. 1).

PLEA.

The defense to the action is presented in a special plea (pp. 2 and 3), which, admitting the plaintiff's so-called appointment as policeman by the Commissioners of the District, at the rate of wages stated in the declaration, and

that service under the appointment was well and faithfully performed for the time stated, sets up in avoidance that the appointment had no validity because the law requires, as a condition precedent to the validity of an appointment as a member of the Metropolitan police, that the appointee shall have served in the Army or Navy of the United States, and that plantiff had not rendered such service.

DEMURRER.

To this plea the plaintiff demurred (p. 3), assigning as grounds that the law relied on in the plea has been repealed; and that performance of the service and acceptance of such performance entitles the plaintiff to a recovery.

The demurrer was certified to the general term to be there heard in the first instance (p. 4).

The demurrer was sustained and judgment entered for the plaintiff (pp. 4, 5).

The reasons on which the court proceeded in upholding the demurrer are fully set forth in the opinion of Mr. Justice James (pp. 5–7).

ASSIGNMENT OF ERROR.

The judgment is erroneous in this, that the demurrer should have been overruled and the action dismissed, for the reasons set forth in the plea.

ARGUMENT.

Section 354 (R. S. D. C.) provides as follows:

> That no person shall be appointed to office, or hold office in the police force, who can not read and write the English language, or who is not a citizen of the United States, or who shall ever have been indicted and convicted of crime; and no person shall be appointed as policeman or watchman who has not served in the Army or Navy of the United States and received an honorable discharge.

The result of the decision of the court below is that the act of June 11, 1878 (20 Stat., 102), has repealed said section 354.

That act provides (§ 3) that the District Commissioners shall have power "to abolish any office, * * * remove from office, and make appointments to any office under them authorized by law," and further provides (§ 6):

> That from and after the first day of July, eighteen hundred and seventy-eight, the board of metropolitan police and the board of school trustees shall be abolished; and *all the powers and duties* now exercised by them shall be transferred to the said Commissioners of the District of Columbia, who shall have authority to employ such officers and agents, and to adopt such provisions as may be necessary to carry into execution *the powers and duties* devolved upon them by this act. And the Commissioners of the District of Columbia shall from time to time appoint nineteen persons, actual residents of said District of Columbia, to constitute the trustees of public schools of said District, who shall serve without compensation and for such terms as said Commissioners shall fix. Said trustees shall have the powers and perform the duties in relation to the care and management of the public schools which are now authorized by law.

So that, under this view of the learned court, a person "who can not read and write the English language," or "who is not a citizen of the United States," or who has been "indicted and convicted of crime," or "who has not served in the Army or Navy of the United States and received an honorable discharge" may be appointed to any position in the Metropolitan police force. In a word,

the decision is that Congress has legislated so unwisely as to do away with all law prescribing the qualifications of members of the police force, and leave the matter to the Commissioners, unreservedly.

The act of 1878, which is supposed to have produced this effect, contains no words of repeal, but the court below held that there was a necessary implication in the act of an intention to repeal section 354.

If the act of 1878 had prescribed what the qualifications for appointments to the police force should be, the intention to supplant section 354 would have been clear; but the act is silent on the subject. Upon what ground of construction can we say that the old law requiring that a policeman shall have certain qualifications is impliedly repealed by the subsequent law? There is no inconsistency between the full power over appointments and removals in the police force given to the District Commissioners and the previous law requiring that a policeman should read and write English, be a citizen of the United States, should not have been convicted of crime, and should have served in the Army or Navy and been honorably discharged therefrom.

If section 354 is repealed, then is also section 357, forbidding a member of the police force to receive, under any pretense whatever, "any present, fee, or emolument for police services other than the regular salary and pay provided by this chapter, except by consent of the board of police;" and the same may be said of section 351, requiring that the members of the police force shall be required to take an oath of office, and other sections which need not be particularly mentioned.

That Congress had no intention whatever of repealing section 354 is conclusively shown by section 3 of the act of January 31, 1883 (22 Stat., 412, Supplement to Rev. Stat., p. 397, 2d edition), which is in the following words:

> That the Commissioners may, and they are hereby, authorized to appoint not more than six privates, to be members of the police force, from among citizens of the United States *who have or have not served in the Army and Navy of the United States*, but who shall possess ALL THE OTHER QUALIFICATIONS PRESCRIBED BY SECTION THREE HUNDRED AND FIFTY-FOUR OF THE REVISED STATUTES OF THE UNITED STATES RELATING TO THE DISTRICT OF COLUMBIA.

This section is not referred to in the opinion of the learned judge of the court below. Had it been brought to the attention of the court it would, we conceive, have compelled a judgment in support of the plea. Congress, it thus appears, clearly recognized section 354 as a part of the subsisting law regulating the police force of the District as much as seven years before the so-called appointment of the defendant in error, Hutton.

Nothing is more improbable than that Congress should have harbored the purpose to deprive the police force of the District of the great advantage of being recruited from men honorably discharged from the Army and Navy, bringing as they do into the force the tone of the regular military service.

It is a mistake to suppose that this requirement was intended to be temporary.

The case of *Eckloff* v. *District of Columbia* (135 U. S., 240) does not conflict with our theory, because it holds that in the matter of appointments and removals from the police force the act of 1878 had superseded and repealed the previous law, which is undoubtedly correct.

But it is to be remembered that it was "THE POWERS AND DUTIES" of the police board only that were transferred to the Commissioners by section 6 of the act of 1878. Now these "*powers and duties*" did not extend to the subject of the qualifications of members of the police force, nor can it be said that the existence of section 354, prescribing such qualifications, is, in any just sense, an interference with or a restriction upon the appointing power of the Commissioners, or is in any way incompatible with the act of 1878. Nobody doubts that Congress may prescribe qualifications for office without at all invading the power of appointment of the President, let alone the Commissioners of the District.

The appointment of Hutton being in violation of law, the District of Columbia can not be compelled to make compensation for services rendered by him under that appointment.

It is respectfully submitted that the judgment should be reversed, with an instruction to the court below to dismiss the suit.

WM. A. MAURY,
Assistant Attorney-General.

O

IN THE

Supreme Court of the United States

OCTOBER TERM, 1891.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HARRY S. HUTTON, DEFENDANT IN ERROR.

Term No. 1338.

BRIEF FOR DEFENDANT IN ERROR.

ANDREW B. DUVALL,

Attorney for Defendant in Error.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1891.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HARRY S. HUTTON, DEFENDANT IN ERROR.

Term No. 1338.

Brief for Defendant in Error.

The Commissioners of the District of Columbia, on June 4, 1890, appointed and commissioned the defendant in error as a private officer on the Metropolitan Police Force of said District upon pay or salary of seventy-five dollars per month; and thereafter he well and faithfully performed the service required as such officer until August 19, 1890, when he was relieved from duty by the Commissioners. He sued for his pay. The District interposed as a special plea in bar, that he ought not to recover because at the time of his appointment by the Commissioners he had not served in the Army or Navy of the United States, and that such service was and is a condition precedent to legal appointment on the police force. A demurrer to this plea was sustained; and judgment entered for the defendant in error. (Record, p. 4.)

Argument.

It is respectfully submitted that there was no error in the judgment below.

There was but one question involved. Is Section 354, Revised Statutes of the District of Columbia, in full force, or has it been repealed? The defendant in error contended that the said section has been repealed, and that the Commissioners may appoint on the police force persons who have not served in the Army or Navy.

This section is part of the Act of August 6, 1861, establishing the "Board of Metropolitan Police;" and is as follows:

> SECTION 354. No person shall be appointed to office, or hold office in the police force who cannot read and write the English language, or who is not a citizen of the United States, or who shall ever have been indicted and convicted of crime; and no person shall be appointed as policeman or watchman who has not served in the Army or Navy of the United States and received an honorable discharge.

The act of June 11, 1878, (20 Stat., 102, Ch. 180,) provided "a permanent form of government for the District of Columbia." By Section 3 of that Act, the Commissioners are empowered:

> To abolish any office, * * * remove from office, *and make appointments to any office* under them authorized by law.

Section 6 of that Act reads:

> That from and after the first day of July, 1878, the Board of Metropolitan Police and the Board of School Trustees shall be abolished; and all the powers and duties now exercised by them shall be transferred to the said Commissioners of the District of Columbia, *who shall have authority to employ such officers and agents* and to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this act.

The court held (Record, p. 6–7) that Section 354 was repealed by the Act of 1878; which latter act is to be regarded as an organic act intended to dispose of the whole question of a permanent Government for the District of Columbia. That the grant of power contained in this new or organic act (Section 6) is directly applied to the police force and indicates a plenary power as to the selection of the persons appointed; that it appears in terms to exempt the appointing power from restrictions or limitations in this selection.

The court based its decision upon the construction given by this Honorable Court to the Act of 1878, in the case of *Eckloff* vs. *District of Columbia*, 135 U. S., 240. That case involved Section 355, R. S. D. C., (Section 8 of this same Act of August 6, 1861) which provided:

> **No person shall be removed from the police force except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defence; and no person removed from the police force for cause shall be reappointed to any office in said force.**

The question was whether the Commissioners were by this section restricted in the matter of removals from this same police force except after trial as therein provided.

Mr. Justice Brewer delivering the opinion of the court, after reciting the history of the legislation relating to the Metropolitan Police Force and the Board of School Trustees, used this language (135 U. S., 242):

> **It will be noticed that a distinction is provided between the police and the schools. An intermediate board is to be appointed for the latter, while *the direct control of the police* is given to the commissioners; and they "are authorized to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this act." *When to a board having general administrative supervision of the affairs of a community, and with plenary power in the matter of appointment and removal of subordinates, is added the control of another department, and no express words of limitation are found in the act making the transfer, it is to be presumed that***

such board has the same plenary power in respect to this new department, and IS NOT HAMPERED BY LIMITATIONS *attached to the board which theretofore had control of it.* The presumption against implied repeal obtaining in the construction of ordinary statutes yields to the inferences arising from the subject matter of legislation. Plenary powers having been found by experience valuable in the management of affairs already under the control of the board, *the transfer of another department to the same control carries with it a strong implication that the added department is subject to the same plenary powers.* The primary thought is not a mere transfer of authority, but the bringing of the added department within the control of the general supervising board. IT IS UNITY OF ADMINISTRATION AND NOT CHANGE OF COMMISSION.

But our conclusions are not controlled by this construction alone. The court below placed its decision on what we conceive to be the *true significance of the Act of 1878.* As said by that court, it is to be regarded as an *organic act,* intended to dispose of the whole question of a government for this District. IT IS, AS IT WERE, A CONSTITUTION FOR THE DISTRICT. It is declared by its title to be an act to provide "a permanent form of government for the District." The word permanent is suggestive. It implies that prior systems had been temporary and provisional. *As permanent it is complete in itself. It is the system of government. The powers which are conferred are organic powers.* WE LOOK TO THE ACT ITSELF FOR THEIR EXTENT AND LIMITATIONS. *It is not one act in a series of legislation, and to be made to fit into the provisions of the prior legislation, but is a single complete act, the outcome of previous experiments, and the final judgment of Congress as to the system of government which should obtain.* IT IS THE CONSTITUTION OF THE DISTRICT, AND ITS GRANTS OF POWER ARE TO BE TAKEN AS NEW AND INDEPENDENT GRANTS, AND EXPRESSING IN THEMSELVES BOTH THEIR EXTENT AND LIMITATIONS. *Such was the view taken by the court below; and such we believe is the true view to be taken of the statute. Regarded in this light, but one interpretation can be placed upon the section quoted. The power to remove is a power without limitations. The power is granted in general terms, as well as the authority to adopt such provisions as may be necessary to carry it into execution. Full authority is given to the commission; and in the absence of rules and regulations directing a different procedure, its act of summary dismissal cannot be challenged.*

We submit that Section 354, under consideration in the present case, for the same identical reasons was repealed.

The only answer to Eckloff *vs.* District of Columbia

(135 U. S., 240) suggested by appellant is, that "the powers and duties" of the police board transferred to the Commissioners did not extend to the subject of the qualifications of members of the police force, but this court has said, *supra:*

> **The primary thought is not a mere transfer of authority, but the bringing of the added department within the control of the general supervising board. IT IS UNITY OF ADMINISTRATION AND NOT CHANGE OF COMMISSION.**

It was, of course, within the power of Congress, by appropriate language, to attach the pre-existing limitations and qualifications to the grant in the permanent constitution, or to otherwise limit and qualify the express plenary power. But Congress in its "final judgment as to the system of government which should obtain," in no wise restrained the plenary power granted the Commissioners "to make appointments to any office under them authorized by law," and "to employ such officers and agents * * * as may be necessary to carry into execution the powers and duties devolved upon them."

It is argued (page 5, appellant's brief) that the Act of January 31, 1883, (2d edition, Supplement, page 397) should compel a judgment in support of the plea, because it is claimed it shows Congress had no intention of repealing section 354. The purpose of this act was to abolish the "detective force," consisting of six privates; and it authorized the Commissioners to detail a like number of the police force to detective duty with the same pay as the abolished "detective force."

The controlling consideration, however, must be, what was the legal effect of the previous legislation of Congress on the subject matter? Had Section 354 been repealed, is the recurring and crucial question. If so, this act did not

profess to re-enact it: nor did it accomplish this result unless the mere reference to a statute five years after its repeal operates to re-enact and revivify it.

Effect cannot be given to an unexpressed intention.

But before Congress can be supposed to have intended to re-enact this section, it must be supposed to have known that it had been repealed. This had been done by implication, and involved the judicial construction of the several statutes.

A mistaken opinion of the legislature concerning the law does not make law.

Postmaster Genl. *vs.* Early, 12 Wheat., 148.

Nor does an act of Parliament alter the law by merely betraying an erroneous opinion of it, so as to make it accord with the misconception.

Dore *vs.* Gray, 2 T. R., 358.

Exp. Lloyd, 1 Sim. N. S., 251.

And, the fact that a statute is referred to in a subsequent one, the reference not being intended as a re-enactment, will not give it vitality.

South Ottawa *vs.* Perkins, 94 U. S., 270.

Even where the later act attempts to amend an earlier one, previously repealed by implication, the copying of parts of the earlier act into the amendment will not re-enact it.

Stingel *vs.* Nevel, 9 Oreg., 62.

Even a recital in an act that a former statute was repealed or superseded by another is not conclusive upon the question of its repeal; that being a judicial, not a legislative one.

U. S. *vs.* Claflin, 97 U. S., 549.

It was the manifest purpose of Congress by the provision of the Act of 1867, as suggested by the Court below, (Record, p. 8), "to make an honorable discrimination in favor of the men who had then recently returned to the competitions of civil life after service in the late war." Gratitude for such service prompted the discrimination; moreover, the honorably discharged soldier or sailor then possessed pre-eminently the ideal qualifications for police duties; he was in the prime of life; his courage, intelligence and patriotism had been tested; he was enured to hardships and accustomed to discipline. But a quarter of a century has removed the possibility of securing the services of those honorable veterans, whom Congress rightfully desired to favor; they have long since become ineligible by reason of age and its infirmities. Well may the Court say: "It is not likely that Congress intended to discriminate between the citizen and the soldier or sailor of a peace establishment."

The security of life and property in this National Capital imperatively require that only the best men shall compose its Metropolitan Police Force, which should be the model of its kind. This efficiency cannot be attained if the Commissioners are circumscribed and limited in their appointments to a class which, of necessity, in name only can possess the qualifications required in 1867. But, they are "not hampered by limitations" attached to the old Police Board.

It is respectfully submitted that the judgment below should be affirmed.

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